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IN THE

Supreme Court of the United States

CASA DE CAMBIO COMDIV S.A. DE C.V.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION L.L.C. AND THE AMERICAN BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a holder in due course of a Treasury check is entitled to recovery where the Treasury has acted in a manner that is contrary to commercial practices to which it is obligated to conform as modified by Treasury regulations, and that would undermine the normal processes for the negotiation of Treasury checks and make Treasury checks unreliable.

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BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION L.L.C. AND THE AMERICAN BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

With the consent of the parties, The New York Clearing House Association L.L.C. (the "Clearing House") and the American Bankers Association (the "ABA") submit this brief as *amici curiae* in support of Casa de Cambio Comdiv S.A. de C.V.'s ("Casa") Petition for Writ of Certiorari ("Petition") for review of the opinion of the Court of Appeals reported at 291 F.3d 1356 (Fed. Cir. 2002) ("Federal Circuit Opinion").[1]

[1] No counsel for a party authored any portion of this brief, nor did any person or entity other than the *amici curiae* make any monetary contribution to the preparation or submission of the brief.

STATEMENT OF INTEREST OF *AMICI*

The Clearing House is an association of leading commercial banks that provides payment, clearing and settlement services to its member banks and other financial institutions.[2] The Clearing House regularly appears as *amicus curiae* before appellate courts in cases that raise significant legal issues relating to banking and in particular in cases, like this one, that raise important questions concerning rules governing national and international payment systems.

The ABA is the principal national trade association of the banking industry in the United States. It has members located in each of the fifty states and the District of Columbia and includes banks of all types and sizes—money center banks, regional banks and community banks. ABA members hold approximately 95 percent of the domestic assets of United States banks.

The Federal Circuit Opinion for which review is sought precludes parties, who in good faith take a Treasury check for value, from obtaining a remedy when the Treasury refuses to comply with applicable law and regulations concerning its ultimate payment of such a check. The resulting unenforceability of the Treasury's obligation to pay or return its own checks will impair the efficiency and reliability of the banking system in which the amici's members participate, because every day they must make millions of dollars of funds available to customers based on their own prompt and effective decisions about whether to honor such checks.

Casa received and in good faith gave value for a forged Treasury check in the amount of $1,165,000 on October 29,

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[2] The members of the Clearing House are Bank of America, National Association; The Bank of New York; Bank One, National Association; Citibank N.A.; Deutsche Bank Trust Company Americas; Fleet National Bank; HSBC Bank USA; JPMorgan Chase Bank; LaSalle Bank National Association; Wachovia Bank, National Association; and Wells Fargo Bank, National Association.

1993, deposited the check in its account at Norwest Bank, Minnesota, N.A. ("Norwest") and instructed Norwest to forward the check for collection.[3] As Casa's agent, *see* U.C.C. § 4-201(a),[4] and as an intermediary in the collection process, Norwest presented the check to the Federal Reserve Bank of Minnesota, the Treasury's fiscal agent, for payment on Casa's behalf. The Federal Reserve Bank gave credit to Norwest for the check on November 4, 1993. On November 17, 1993, the Treasury identified the check as stolen, but did not provide any notification to Casa or Norwest. Nor did the Treasury direct the Federal Reserve Bank to reverse the credit it had given to Norwest for the check until February 1, 1994, three months after the check was presented and 75 days after the Treasury knew that the check had been stolen. (App. 26). Also on February 1, 1994, the Federal Reserve Bank debited Norwest's account with the Federal Reserve Bank and, as Casa's intermediary and transferee, Norwest then debited Casa's account with Norwest for the full amount of the check. *Id.* As of February, 1994, Casa thus suffered a loss.

Revoking payment in such a tardy fashion is contrary to long-standing commercial practice, as well as the Treasury's own regulations, *see* 31 C.F.R. §§ 240.3(c), 240.6. When Casa sued in the Court of Federal Claims, however, the court ruled that the damage suffered by Casa was only "indirect" and therefore that Casa lacked standing to bring suit against

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[3] Because the Federal Circuit Opinion affirmed an order granting a motion to dismiss Casa's complaint, the court presumed that Casa's factual allegations, including taking the check in good faith for value, were true.

[4] For ease of convenience, we refer throughout to the Uniform Commercial Code as the "U.C.C." References to "U.C.C. § 3-___" and "U.C.C. § 4-___" are to sections of Revised Article 3 and Amended Article 4 of the Uniform Commercial Code as they appear in volumes 2 and 2B, respectively, of the Uniform Laws Annotated (West 1991).

the Treasury. Although it believed that Norwest had legal recourse against the United States, 291 F.3d at 1359-60, the Federal Circuit nonetheless affirmed, concluding that a claim against the Treasury could be brought only by the presenting bank—here Norwest, Casa's agent—which suffered no loss because it merely passed on the reversal of payment to its principal, Casa. This decision is plainly inconsistent with precedent governing the use of Treasury checks and, if permitted to stand, will allow the U.S. Treasury to impose significant losses on private parties by failing to act with reasonable promptness.[5]

The Clearing House and ABA banks have a substantial interest in the question presented in this case. "[C]heck volume is still increasing by an estimated 2 percent per year and is now at an annual level of about 70 billion items." Barkley Clark, *The Law of Bank Deposits, Collections and Credit Cards* (hereinafter, "Clark"), Volume I, ¶ 1.06[2] at 1-49 (2002). Their widespread use, however, in conjunction with rapidly-evolving computer and copying technology, has

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[5] There also is an inconsistency in the Federal Circuit Opinion. Either Norwest still was Casa's agent or the Treasury's payment was final and a reclamation procedure was its only remedy. The Treasury is entitled to review a check and decline payment within a reasonable time, 31 C.F.R. § 240.3(c); during this period a collecting bank such as Norwest is acting as the agent of the check's owner, such as Casa. U.C.C. § 4-201(a). That agency terminates once a settlement becomes final, *id.*, and at that point the Treasury's remedy upon discovering that a check contains a forged indorsement or another material defect or alteration is a reclamation procedure which involves notice and protest. 31 C.F.R. § 240.6. The Court of Federal Claims stated clearly, however, that here reclamation "is inapplicable" (App. 27). Under state law principles, therefore, if settlement was not final, Norwest still was Casa's agent, U.C.C. § 4-201, and it was Casa which was entitled to sue for its loss. Comment 4 to U.C.C. § 4-201 recognizes that the depositor, as owner of the check being collected, has "the direct rights of Section 4-302 [establishing a midnight deadline rule for private sector banks] against the payor bank."

resulted in a "dramatic increase in check forgeries in recent years." *Id.*, Section 10.01[2] at 10-1.

Because it purports to deny recovery to the actual victim of the Treasury's actions, the Federal Circuit Opinion constitutes a direct assault on long-standing, well-reasoned loss allocation principles concerning forged checks, and forged Treasury checks in particular. The Clearing House and the ABA are concerned that the Federal Circuit Opinion will upset the accepted commercial practice concerning forged checks and interfere with the certainty and reliability of Treasury checks and, thus, their commercial usefulness. *See ABN Amro Bank N.V.* v. *United States*, 34 Fed. Cl. 126, 132 (1995) (rejecting "argument [that] would result in . . . a . . . fundamental change . . . with respect to the apportionment of risk among banks handling Treasury checks."). Although the Treasury is intended, by this Court's mandate, to stand in the position of "any other drawee," *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 369 (1943), the Federal Circuit Opinion, without recognizing that it has undermined the dependability of Treasury checks, threatens to provide the Treasury with an unwarranted advantage at the expense of other financial institutions.[6]

STATEMENT OF THE CASE

Casa seeks review of an order of the Federal Circuit that affirmed the Court of Federal Claims' dismissal of Casa's complaint. Casa sought to recover on three separate theories. Count I alleged that the Treasury violated 31 C.F.R.

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[6] The Federal Circuit Opinion acknowledged that there was a split among the Courts of Appeals in analogous circumstances as to whether a depositor had a claim against the United States. 291 F.3d at 1364-66. Even without such a conflict, this Court should exercise its discretion to grant review in this case because the decision of the lower court has "so far departed from the accepted and usual course of judicial proceedings" and "has decided an important federal question in a way that conflicts with relevant decisions of this Court." (Sup. Ct. R. 10(a), (c)).

§ 240 because it did not reject payment of the check within a "reasonable time." Count II alleged an illegal exaction without due process in violation of the Fifth Amendment. Count III alleged the government had taken Casa's property without just compensation as guaranteed by the Fifth Amendment.

The Court of Federal Claims dismissed each cause of action. As to Count I, the court held that it lacked jurisdiction because, even if the government had violated Section 240, "nothing in the language of the regulation[s] unequivocally grants a depositor in [Casa's] position a right to recover damages either 'expressly or by implication.'" 291 F.3d at 1358. The court dismissed Count II (the Due Process claim) and Count III (the Takings claim) on the basis that Norwest and not the United States took the action that harmed Casa, and the involvement of the United States was not 'sufficiently direct and substantial' to make the United States liable for a taking of those funds. *Id.*

On appeal, the Federal Circuit affirmed as to each count. Ignoring the reality that Norwest, as Casa's agent entitled to recover from its depositor, suffered no injury, the Federal Circuit asserted that only Norwest, as the presenting bank, could have a claim against the Treasury under each of the causes alleged by Casa. *See* 291 F.3d at 1359, 1361, 1363. The court declined to hold that Casa, the actually injured party, could state a claim under any of these theories because the Treasury's actions purportedly did not affect Casa directly.

The petition followed.

SUMMARY OF ARGUMENT

To deal fairly and efficiently with check forgeries, states have established certain well-settled principles, either through common law or adoption of the Uniform Commercial Code, to (a) encourage efficient decision-making on whether to pay

or return checks while (b) fairly allocating losses resulting from check forgeries. Chief among these principles are (i) that a drawee bank must pay or return a check to a presenting bank by a "midnight deadline" and (ii) as derived from the long-honored doctrine of *Price* v. *Neal*, 3 Burr. 1354, 97 Eng. Rep. 871 (1762), that when a check with a forged drawer's signature is mistakenly paid by the drawee bank to the presenting bank, the risk of loss for the payment falls on the drawee bank and not the holder of the check. The Clearing House and ABA banks depend and rely on these principles, and live with their consequences equally whether benefiting as collecting or presenting banks, or suffering as drawee banks.

The Treasury, as a major participant in commercial transactions, also operates under these same principles with only minor variations. *Clearfield Trust*, 318 U.S. at 369 ("The United States as drawee of commercial paper stands in no different light than any other drawee."). Treasury regulations modify these principles so that the midnight deadline imposed on commercial banks becomes a "reasonable time" for the Treasury.[7] The long-standing loss-allocation laws embodied as federal law in Section 240 have the significant purpose of ensuring the ready negotiability of the Treasury's checks and advancing the important policy of assigning loss, as under state law, based upon the relative responsibility of the parties. *See Getty Petroleum Corp.* v. *American Express Travel Related Services Co.*, 90 N.Y.2d 322, 326 (1997) (noting that the U.C.C. "accomplishes these ends by establishing commercially sound rules designed to

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[7] Under 31 C.F.R. § 240.3(c), the "Treasury shall have the usual right of a drawee to examine checks presented for payment and refuse payment of any checks [and] shall have a reasonable time to make such examination." *See United States* v. *Chase Nat. Bank*, 252 U.S. 485 (1920) (check held to have been deemed paid by Treasury because it was not returned after two weeks).

place the risk of loss attributable to fraud . . . with the party best able to prevent [the loss].").[8]

Notwithstanding these time-honored principles, its own regulations and the sound policies supporting them, the Treasury in this case attempted—and has thus far succeeded in its effort—to recover a payment it made on a forged check long after it had made a settlement on that check and well after any "reasonable time" to revoke the settlement or decline payment had expired. Specifically, months after Casa gave value in good faith for the forged Treasury check, forwarded it to its U.S banker and agent, Norwest, for deposit and collection, and received credit for the check via Norwest, the Treasury directed that Norwest's account with the Federal Reserve Bank be debited for the full amount of the check. Casa is the victim of and real party in interest in the Treasury's belated reversal. Norwest, as Casa's agent and a transferee of the Treasury check directed to collect funds from the Treasury, was entitled to and did in fact debit the full amount of the check from Casa's account with Norwest. Notwithstanding that Norwest was made whole and Casa was left holding the bag that the Treasury had emptied, the Federal Circuit affirmed the dismissal of Casa's case on the theory that only the presenting bank had standing to sue the Treasury in these circumstances.[9]

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[8] Although the U.C.C. as a whole has not been adopted as part of federal law, this Court has recognized that "businessmen depend on state commercial law to provide [essential] stability" and has adopted U.C.C. principles as the federal rule of decision where appropriate. *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 739-740 (1979).

[9] The Federal Circuit did conclude that *someone* had a cause of action against the Treasury. 291 F.3d at 1359-60 ("[I]t is indeed difficult to believe that, where a debit has occurred, making legal action by the United States unnecessary, the presenting bank (here, Norwest) is without legal recourse against the United States. . . . [W]e assume that a claim for unreasonable delay in notification may properly be brought against the United States."). Thus, the Federal Circuit to this extent recognized the

The Federal Circuit Opinion plainly upsets existing loss-allocation principles in every case where there are multiple institutions involved in the collection process of a Treasury check because it limits *who* may bring a claim for a violation of Section 240. Specifically, and notwithstanding the likelihood that the Treasury had violated Section 240, the Federal Circuit affirmed the Court of Federal Claims' ruling that "nothing in the language of the regulation[s] unequivocally grants a depositor in [Casa's] position a right to recover damages either expressly or by implication." 291 F.3d at 1358. The courts below ignored settled commercial principles that give Casa that right, and that apply these principles to the Treasury as drawee. *Clearfield Trust*, 318 U.S. at 369. Because the presenting bank (Norwest) has been and was entitled to be made whole by debiting the account of its depositor, it has neither the incentive nor the standing to bring an action. Because the Federal Circuit Opinion incorrectly holds that an uninjured agent has standing but the injured principal does not, it effectively eliminates actions against the Treasury to recover for delayed reversals of payments on its checks.

This holding is unprecedented and displays a considerable misunderstanding of the process of collection and settlement of negotiable instruments, which must be examined and honored expeditiously to maintain their usefulness. The opinion also runs counter to a long line of decisions that are thoroughly analyzed in a recent ruling of the Court of Federal Claims under similar circumstances. In *ABN Amro*, the Court of Federal Claims addressed the claims of a holder in due course of a Treasury check who, like Casa, in good faith gave value for the check, submitted it to another bank for presentment to the Treasury, received credit for the check through the intermediary presenting bank, and then suffered

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settled law of *Price* v. *Neal* and Section 240 and *did not* hold that Section 240 exists solely for the protection of the Treasury.

the Treasury's belated reversal of credit, as here, through the intermediary presenting bank. In its extensive analysis, the court nowhere acknowledged any standing issue, and ultimately determined that ABN Amro could proceed with its action alleging, *inter alia*, violation of 31 C.F.R. § 240.3(c) and violations of the due process and takings provisions of the U.S. Constitution.[10]

As in this case, a party other than the presenting bank often is the ultimate victim—and suffers the "injury in fact" traditionally sufficient to convey standing—of an attempt by the Treasury to avoid the requirements of Section 240. *See Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("[P]laintiff must have suffered an 'injury in fact' . . . which is concrete or particularized"); *Valley Forge Christian College* v. *Americans United For Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (individual standing requires an "actual injury redressable by the court"). That victimization is entirely predictable because it is clear from the moment the Treasury seeks belatedly to recover a payment on a forged check that *someone*—someone besides the Treasury—will suffer a loss and should have standing to challenge the Treasury's action. *Cf. Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976) (requiring, for standing, that an injury be "fairly . . .

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[10] The reason that the *ABN Amro* court identified no standing issue is because a depositor's right to the funds credited to it as a result of the Treasury's payment on a forged check does not derive from and is not preempted by the Treasury regulations. Under basic banking principles, *see* U.C.C. § 4-201 and comment 4 thereto, Norwest was acting as Casa's agent in presenting the check for collection on Casa's behalf. Casa therefore stood in the shoes of Norwest when Norwest's account was debited by the Treasury; although the debit was facially imposed on Norwest, the loss actually was borne by Casa, which was bound as principal to reimburse Norwest. As principal and payer of the debit, Casa should be entitled to maintain the claims against the United States.

trace[able] to the challenged action of the defendant"); *Lujan*, 504 U.S. at 560 (same).[11]

Further, the Federal Circuit Opinion's deviation from this Court's requirement that the Treasury be treated like other drawees is bad policy because the "present banking system under which an enormous number of checks are processed daily could not function effectively if banks"—and the Treasury—"were not required to make prompt and effective decisions on whether to pay or dishonor checks." *Town & Country State Bank of Newport* v. *First State Bank of St. Paul*, 358 N.W. 2d 387, 395 (Minn. 1984). Were the Federal Circuit Opinion to stand, all commercial banks would be faced with a no-win dilemma regarding their treatment of Treasury checks. If they cash the checks and, as they are required, make the funds available for that check on the next or the following business day, 12 C.F.R. §§ 229.10(c)(1)(i), 229.12(b)(2), the collecting bank is potentially subject to reversal of payment for months under the Federal Circuit Opinion.

For these reasons, the *amici* respectfully request that Casa's Petition be granted.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED BECAUSE THE FEDERAL CIRCUIT OPINION EFFECTIVELY ELIMINATES ACTIONS AGAINST THE TREASURY FOR ITS VIOLATIONS OF LONG-STANDING LOSS ALLOCATION AND AGENCY PRINCIPLES REGARDING FORGED CHECKS.

To encourage banks to expedite check processing, and to provide certainty for banks seeking to determine their exposure when cashing checks for their depositors, U.S.

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[11] If the Treasury instead acts quickly, prompt notification that a check is stolen increases the potential of avoiding a loss by any innocent party.

legislatures and courts have adopted two rules relevant to this matter which act together effectively and fairly to allocate loss among banks for forged checks: *First*, banks are subject to a "midnight deadline" rule. Pursuant to this rule, when a drawee bank is presented with a check for payment, it must complete an examination of the check for payment or dishonor by midnight of the first business day after presentment. *See* U.C.C. §§ 4-301(a), 4-215(a)(3). *Second*, banks are subject to a final payment rule. That is, as first stated in *Price* v. *Neal*, a core concept in the payments system is that where a forged check is mistakenly paid by the drawee bank to the presenting bank, the risk of loss for the forgery generally falls on the drawee bank. *See* U.C.C. § 3-418.

The principles underlying these loss allocation provisions are sound and time-honored. The drawee bank generally will be in a superior position to determine the genuineness of a check and of the drawer's signature, whereas collecting banks typically will have no knowledge of a forged drawer's signature until they hear about it from the drawee bank. It is appropriate, therefore, that the drawee bank, as opposed to the collecting bank or the depositor, should bear the risk of a mistaken payment.[12] Further, the final payment provision ensures that there is no danger that a series of commercial transactions will need to be reopened or reversed. *See, e.g.*, *ABN Amro*, 34 Fed. Cl. at 133 ("Because it would permit Treasury, after a delay, to reopen and upset a series of prior bank transactions, defendant's interpretation would create additional indefiniteness in the banking system as to liability."). The rule thus permits banks to make funds available to their depositors with some reasonable assurance that they will not be required to recover the funds from the depositor. Finally, because the final payment rule as between collecting

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[12] Similarly, in this case the Treasury was in the best position to know that the check at issue had been stolen and that the drawer's signature was unauthorized.

and drawee banks is not negligence-based, once final payment has been made, banks need not waste time, money or energy arguing about the cleverness of a forgery. That is, provided that the collecting bank took the check in good faith and for value or in good faith changed its position in reliance on the payment for the check, the drawee bank is responsible for the loss regardless of whether a reasonable bank arguably would have detected the fraud. A bright-line rule reduces disputes and permits banks more effectively to plan for risk of loss.

Owing to the soundness of these loss allocation provisions, this Court has recognized that the Treasury, to the extent it wishes to participate freely in commercial transactions with private banks, is subject to the same rules. *Clearfield Trust*, 318 U.S. at 369 ("The United States as drawee of commercial paper stands in no different light than any other drawee."). *See also* Clark, Section 10.10[1] at 10-193 ("[A] double standard flies in the face of Supreme Court cases like *Clearfield Trust Co. v. United States*, where Justice Douglas emphasized that Treasury should generally be held liable to the standards of commercial banks in handling negotiable instruments.").

Accordingly, the Treasury's regulations incorporate the *Price* v. *Neal* rule with only slight variation. 31 C.F.R. § 240.3(c) ("The Treasury shall have the usual right of a drawee to examine checks presented for payment and refuse payment of any checks [and] shall have a reasonable time to make such examination."); 12 C.F.R. § 229.10(c)(1)(i) (depositary bank to make funds available for withdrawal not later than next business day after day of deposit of Treasury check into payee's account), 12 C.F.R. § 229.12(b)(2) (second business day availability after other deposits of Treasury checks). "The plain language of the regulations indicates that there is no blanket government immunity in this area; instead, the principles governing payment of U.S. Treasury checks is a close variation of the finality doctrine of *Price* v. *Neal*."

Clark, Section 10.10[1] at 10-192. *See also United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979); *Clearfield Trust*, 318 U.S. at 369.

Although the Federal Circuit recognized this settled law, *see supra* at n.9, its affirmation of the Court of Federal Claim's decision has the actual effect of rejecting it, by limiting who may bring a claim for improper rejection of a Treasury check. This limitation, if permitted to stand, would constitute a significant, unwarranted and unprecedented departure from traditional commercial practice for several reasons.

First, the court's holding that even if the government had violated Section 240, those regulations were "directed only at protecting the Treasury's rights, rather than those of third parties . . . [and] nothing in the language of the regulation[s] unequivocally grants a depositor in [Casa's] position a right to recover damages either expressly or by implication," 291 F.3d at 1358, ignores the fundamental legal relationship of a depositor (like Casa) and the depository and collecting bank (like Norwest). It is axiomatic that a collecting bank is normally the agent of the depositor with respect to checks deposited for collection. To that end, the U.C.C. specifically provides that

> "Unless a contrary intent clearly appears and before the time that a settlement given by a collecting bank for an item is or becomes final, the bank, with respect to the item, is an agent or sub-agent of the owner of the item and any settlement for the item is provisional. . . . If an item is handled by banks for purposes of presentment, payment, collection, or return, the relevant provisions of this Article apply even though the action of the parties clearly establishes that a particular bank has purchased the item and is the owner of it."

U.C.C. § 4-201(a).

Here, the Federal Circuit Opinion would perpetuate the faulty fundamental premise of the opinion of the Court of Federal Claims, *i.e.*, its assumption that Casa "had a remedy [against Norwest], but chose not to pursue it." (App. 48). Based on this faulty assumption, the Court of Federal Claims suggested that Casa could have sued Norwest, which in turn could have "interpled" the Treasury. (App. 39-40). In such case, the court suggested that the challenged violation of the regulations would have been properly before the court.

In fact, Casa has no claim against Norwest. Norwest was acting as Casa's agent in presenting the check for collection on Casa's behalf. When the Treasury ordered the debit of the check, it was a loss actually imposed on and borne by Casa. Norwest was entitled to reimbursement from Casa pursuant to U.C.C. §§ 4-207 and 3-416, which require a transferor of a check to give certain warranties to his transferee and subsequent holders (but not the drawee), including that all signatures, including the drawer's, are "genuine and authorized." *Id.* Because Casa, albeit unknowingly, breached these warranties, Norwest was entitled to debit Casa's account. Therefore, as principal and payer of the debit, Casa has a direct claim against the United States. *See* U.C.C. § 4-201 and comment 4 thereto. Consequently, this case is not about faulty pleading, but fundamental rights.

Second, the Federal Circuit Opinion runs directly counter to traditional standing analysis where the power to sue is naturally bestowed on the party that suffered the loss, here Casa, the depositor with the presenting bank. The lower courts in this matter have decreed instead that suit may be brought only by Norwest, the presenting bank, which suffered no loss. Why would an uninjured presenting bank sue and why should a court entertain such a suit? The Court of Federal Claims' answer that Casa should have sued Norwest, which then "would have interpled the United States" (App. 39-40), not only is unnecessarily complex, but is legally

unsustainable.[13] What legitimate claim does Casa have against Norwest? If it has none, as we believe is the case, then the question of the Treasury's liability is never reached, and the judicial system is unduly burdened by needless litigation. Suppose as well that the depositary bank is not a member of the Federal Reserve System. Would the solution then be for the depositor to sue its bank, which then would sue the presenting bank (a member of the Federal Reserve system), which then would attempt to sue the United States?

Third, to the extent that there exists any precedent on this issue, the Court of Federal Claims previously did acknowledge, albeit implicitly in analogous circumstances, that a depositor *is* entitled to pursue an action directly against the Treasury. In *ABN Amro*, the plaintiff, ABN Amro, sued the Treasury for damages suffered from an unauthorized reversal of a credit for a Treasury check cashed by the plaintiff but submitted to the Treasury for payment by an intermediary presenting bank. Although the case concerned a double forgery—*i.e.*, a forged check with a forged indorsement—the court's rationale applies with equal force here. At bottom, "Defendant's interpretation would supersede the result in *Price* because . . . the responsibility for the loss would generally be placed on the depository bank notwithstanding the fact that Treasury was the drawee on the check and seemingly in a far superior position than the depository bank to identify a forged drawer signature." 34 Fed. Cl. at 132-33. Accordingly, ABN Amro was permitted to pursue an action against the Treasury regardless of the fact that a different bank had presented the check to the Treasury for payment.

In short, the Federal Circuit Opinion, without precedent, provides the Treasury with an unjustified dispensation and upsets the long-standing policy objectives of processing

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[13] The putative lawsuit by Casa against Norwest would not have been filed in the Court of Federal Claims, the only court in which a claim of this magnitude against the Treasury could be filed. 28 U.S.C. § 1491.

checks efficiently and allocating fairly losses due to check forgeries. Well-established loss-allocation laws have the valuable purpose of ensuring the ready negotiability of commercial paper and advance the important policy of assigning loss based upon the relative ability to prevent the loss. The U.C.C. and the Treasury regulations "accomplish[] these ends by establishing commercially sound rules designed to place the risk of loss attributable to fraud . . . with the party best able to prevent [the loss]." *Getty Petroleum Corp.* v. *American Express Travel Related Services Co.*, 90 N.Y.2d 322, 326 (1997). The Federal Circuit Opinion, without explanation, would upset this balance. Review therefore is warranted.

II. THE PETITION ALSO SHOULD BE GRANTED BECAUSE THE FEDERAL CIRCUIT OPINION WILL DRAMATICALLY ALTER COMMERCIAL BANKING PRACTICE

The Federal Circuit Opinion cannot be correct as a matter of law. The idea that only the presenting bank has standing to challenge the Treasury's late recovery of payment on a forged check is not consistent with standing principles. Standing is conferred on persons who suffered actual, foreseeable injury. *See, e.g., Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("[P]laintiff must have suffered an 'injury in fact' . . . which is concrete or particularized" and "fairly . . . trace[able] to the challenged action of the defendant"). It is uncontested that Casa is that party here, and that the Treasury's actions had the natural and predictable consequence of injury to Casa. Moreover, because in many cases, including this one, the absence of injury to the presenting bank precludes standing for it, the inevitable consequence of the Federal Circuit Opinion is that the Treasury is immunized from its violation because no standing exists for anyone.

Further, the law on which the Treasury regulations are based expressly contemplates that check-processing encom-

passes a series of transactions and that the final payment of a check should not be reversed because it would upset each of those transactions. Thus, Comment 1 to N.Y. U.C.C. § 3-418 notes that "it is highly desirable to end the transaction on an instrument when it is paid rather than reopen and upset a series of commercial transactions at a later date when the forgery is discovered." *See United States* v. *Kimbell Foods*, 440 U.S. at 729 (declining to establish a distinct federal rule whose application "would disrupt commercial relationships predicated on state law"); *ABN Amro*, 34 Fed. Cl. at 133 (declining to adopt Treasury's position which "would create additional indefiniteness in the banking system as to liability"). Plainly, the law contemplates that more than one bank may be harmed by the Treasury's attempt to recover amounts paid on a check, and thus foresees recovery by the party that bears the loss. Thus, to the extent the regulations potentially confer standing on the presenting bank, they cannot reasonably be interpreted otherwise as to upstream banks or the depositor who has suffered the loss.

The Federal Circuit Opinion also cannot be correct as a matter of policy. It enables the Treasury to escape the consequences of its error and to impose those consequences on an innocent party. In order to avoid this result in the future, banks would be required to alter their processing of Treasury checks, so that the depositary bank maintains a right of action against the presenting bank. This would destroy the very uniformity that the Treasury's regulations are designed to create and result in two inconsistent side-by-side systems for check collections.

Even then, the ultimate result would be the replacement of a finality rule with a steady stream of litigation, an outcome incompatible with the desired negotiability of Treasury checks. Each forged check would represent another lawsuit, placing a burden on the courts, the banking system and the

Treasury alike. It is difficult to imagine why it is desirable to replace a well-established rule of law that promotes ease and efficiency with constant litigation.

Finally, this new "no-standing" rule will have an adverse effect on the utility of Treasury checks. The principal benefit of Treasury checks is that they are dependable, and not only as to creditworthiness. Federal regulations require that funds be made available on the business day or two following the banking day of deposit for Treasury checks. *See* 12 C.F.R. § 229.10(c)(1)(i), 229.12(b)(2). The ruling below creates potential obstacles to collection that make Treasury checks less attractive. For these and like reasons, the Court of Federal Claims has acknowledged that the Treasury itself likely did not intend to change established law through its regulations. *See ABN Amro*, 34 Fed. Cl. at 133 ("[I]t would be expected that had Treasury intended to adopt regulations that would modify *Price* and significantly change the apportionment of risk between Treasury and depository banks, Treasury would have made that intention evident."). Yet this is what the Federal Circuit now has done.

CONCLUSION

The Federal Circuit Opinion, if permitted to stand, would significantly alter banking practice and, in particular, the treatment, reliability and usefulness of Treasury checks. Because the opinion destroys the certainty and predictability provided by previous jurisprudence, and its legal analysis is in error, the decision warrants review and, ultimately, reversal.

Respectfully submitted,

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